Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier	)	
Selection Changes Provisions of the	)	
Telecommunications Act of 1996	)	
	)	
Policies and Rules Concerning	)	CC Docket No. 94-129
Unauthorized Changes of Consumers	)	
Long Distance Carriers	)	

PETITION FOR RECONSIDERATION

National Telephone Cooperative Association

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March 18, l999

TABLE OF CONTENTS

SUMMARY

Following the implementation of equal access and the widespread practice of the Interexchange carriers of submitting changes in carrier selection on behalf of subscribers, the rural telephone company members of the National Telephone Cooperative Association found themselves with a major business and subscriber relations problem. The cause of this problem was the very high percent of changes submitted by IXCs which were unauthorized. The result was that highly incensed subscribers blamed their local carrier for all the cost and inconvenience. To prevent this major harm to their subscribers and protect their excellent reputations for high quality customer service, many of the rural LECs began verifying submitted changes with their subscribers prior to execution. This practice virtually eliminated slamming in these service territories, much to the gratitude of the consumers.

Now the Commission has decided that this pro-consumer practice violates the Communications Act and must be prohibited. The Commission=s conclusion is wrong as a matter of law and policy and violates the Congressional purpose to put the interests of consumers above those of the interexchange carriers which have created a whole industry based upon stealing customers from one another without the consent or knowledge of the customer.

The Commission=s conclusion that Section 222(b) of the Communications Act requires a LEC receiving a change order to execute it without consulting the subscriber is an erroneous reading of both the letter and purpose of the statute, and is contrary to the public interest. The Commission concludes that because the law requires carriers to protect proprietary information of other carriers and only use it for the purpose provided, they are thus forbidden from advising the

end user customer that a change in the customer=s preferred carrier has been submitted. The Commission=s error is that verification is not a use different from that for which the purported change was requested, but is an integral part of it. The service of establishing a 1+ dialing preference in its software is a service that is offered by the LEC to the *end user*, for which a charge to the *end user* is made in the LEC=s interstate tariff. Certainly LECs are obligated to keep confidential one IXC=s presubscribed customers from other IXCs, but such information cannot be considered proprietary *as to the end user.*

Carrier change requests are submitted by IXCs as purported agents of the end user. Basic principles of agency demonstrate that the actions of an agent cannot be a secret from its principal. The Commission cannot presume from the wording of Section 222(b) that Congress intended to change such a basic common law principle without explicitly so providing. Because the rural LECs have found that at least 40-50% of the changes submitted by IXCs are incorrect or unauthorized, they have no basis upon which to presume that any IXC is an authorized agent of their subscribers, and they are therefore exposed to liability for damage claims if they act on the IXCs= submissions without determining their authority.

Verification causes no material harm to the IXCs. The rural LECs perform the verification promptly and engage in no marketing whatsoever during the process. Many of them have not even a hypothetical incentive to favor one IXC over another. Although there is no harm to the IXCs, slamming, which would otherwise be prevented, causes serious harm to consumers, the LECs and to competition in the interexchange market. The minute risk that small rural LECs could somehow harm giant IXCs like AT&T and MCI must be balanced against the real,

substantial and demonstrated harm of slamming which the Commission has so far been unable to prevent. Should the new rules finally succeed in eliminating slamming, a triumph of hope over experience, the LECs would have no more reason to continue verification.

Communication with subscribers as to requests from their purported agents to change their preferred carrier is commercial speech protected by the First Amendment to the Constitution. A prohibition on such speech, rather than advance the government interest in preventing slamming and promoting competition, actually promotes slamming and prevents real competition. The prohibition is, therefore, not the least restrictive rule which could have been adopted.

The rule absolving consumers from liability for charges to an authorized carrier should extend until 30 days after the consumer has notice, by bill or otherwise, of the unauthorized change. Otherwise, slamming carriers will hold back most or all of the slammed customers= bill until after the 30 day period has run. The Commission should also clarify whether LECs which are also billing agents have any obligations themselves to make changes in subscriber=s bills upon notification of an unauthorized change.

Finally, the Commission=s Order fails to comply with the Regulatory Flexibility Act. Contrary to the Commission=s long held belief, this Act does apply to small rural LECs because they are not dominant on a nationwide basis, which according to the Small Business Administration is the proper test. The SBA, not the FCC, is the agency charged with determining which entities are covered by the RFA. The Commission=s Final Regulatory Flexibility Analysis fails to describe any steps taken to minimize the economic impact on rural telephone companies

of prohibiting verification or to explain why alternatives were rejected. The FRFA never mentions the LEC verification issue or the Commission=s conclusion as to the requirements of Section 222(b), which is the issue of most concern to the small entities the RFA was intented to protect. Instead the entire LEC discussion is directed at suggestions from Bell companies.

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PETITION FOR RECONSIDERATION

The National Telephone Cooperative Association (NTCA), pursuant to 47 C.F.R. 1.106 and 1.429, submits this Petition for Reconsideration of the Second Report and Order (Order) in this proceeding, released December 23, 1998, FCC 98-334, 64 Fed. Reg. 7746, Feb. 16, 1999. NTCA is a national trade association representing more than 500 independent local exchange carriers (LECs) providing service throughout rural America. NTCA=s LEC members are directly interested in the rules adopted in the Order because the rules will have a substantial effect on the volume of unauthorized changes to their subscribers= preferred carriers and thereby directly impair their excellent reputation for customer oriented service. [1]

[1] With respect to the requirements of Section 1.106(b)(1) of the Commission=s Rules, NTCA did not previously participate in this proceeding. The Further Notice of Proposed Rulemaking (FNPRM) 12 FCC Rcd 10,674(1997) provided no indication that the Commission believed that validation of preferred carrier changes by executing carriers violated Section 222(b)

of the Communications Act. Rather the discussion was framed in the context of a tentative conclusion that Section 258 of the Act did not *require* such verification. FNPRM at para.14. If the Commission believed then that the Act might prohibit such actions it would not have discussed the question of whether verification was required.

I. INTRODUCTION

The implementation of equal access beginning in September 1985 provided subscribers with the opportunity to choose a Aprimary carrier≅ for interLATA long distance service which would be reached by dialing A1" before the called number.[2] Initial choices of carriers were made by subscriber balloting among those Interexchange Carriers (IXCs) which registered with the LEC serving the subscriber. In order to regulate the process for subsequent changes in presubscribed carriers, as well as provide for selection by new subscribers, the Commission adopted rules which established procedures whereby an IXC which obtained a subscriber=s agreement to change its 1+ presubscription to that IXC, could submit the order or change directly to the executing LEC as the subscriber=s agent.[3] These procedures permitted IXCs to develop the practice of Aslamming≅ which has become the greatest single source of consumer complaints. Repeated attempts by the Congress and the Commission have, to date, been largely ineffective in halting the spread of this dishonest practice.[4]

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[2] *See*, Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 FCC 2d 911, 924-927 (1985) (AAllocation Order≅). The choosing of the 1+ carrier is termed Apresubscription.≅

[3] *Id*. Subpart K of Part 64 of the Commission=s rules now in effect regulates the manner in which IXCs may submit change orders generated by telemarketing and the form and content of letters of agency. These rules demonstrate that the change order is submitted by the IXC *on behalf of the end user as his or her agent* and that the service to be provided is a service to the end user. The Commission stated in the FNPRM AA subscriber may authorize a change of his or her telecommunications carrier by requesting the change directly from his or her local exchange carrier (LEC), or by authorizing the new carrier to request a change *on his or her behalf . . .*≅ FNPRM at para.14. 12 FCC Rcd 10683.

[4] *See*, Order at para. 2; Florida Public Service Commission News Release, February 16, l999 (documented 183 slamming allegations against AT&T); Michigan Public Service

As the Order acknowledges, slamming causes significant harm to both the slammed customer and the executing LEC. [5] The often highly irate customer blames the LEC for making a change without authorization. This results in substantial time, expense and trauma for the LEC=s customer service representatives who must not only bear the initial wrath of the customer, but also the increase in the customer=s displeasure and disbelief when told that the LEC was not to blame. In order to stem this serious harm to their credibility and goodwill, many LECs instituted the practice of verifying IXC submitted carrier changes with the customer before executing them.[6]

The LECs found that the time and expense of verification were substantially less than what had been required to deal with slamming complaints and, more importantly, by eliminating slamming the subscribers were saved from significant aggravation. The cooperative and locally owned and controlled rural LECs are genuinely concerned for the welfare of their subscribers and

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Commission, News Release, February 26, l999 (show cause order against 13 companies).

[5] Order at para. 55 (recognizing that slamming creates Aangry phone calls from consumers≅ to LECs.)

[6] The verification was variously accomplished by telephone or letter in a manner which did not produce undue delay in execution and involved absolutely no marketing of the services of the LEC or its affiliates or any attempt to change the customer=s mind or in any way influence his/her choice of IXC.

place a high value on their excellent reputation for customer service. Prevention of fraud and mistakes affecting the subscribers is a legitimate priority for these LECs.

With the release of the Commission=s Order finding that verification by executing LECs violates Section 222(b) of the Act, and adopting rules prohibiting the practice, the LECs have largely discontinued verification, despite their continued belief that the practice is in the best interest of their consumers and is entirely lawful. The result has been entirely predictable, the customer service representatives are again receiving calls from angry subscribers who have been slammed, with the resulting waste of time and expense and unrecoverable damage to the LEC=s goodwill and reputation.[7] In adopting the Order, the Commission failed to heed the admonition of Senator McCain:

> [M]ake sure that consumers= rights are given precedence over the narrow competitive interests of those companies whose unethical or careless business practices result in slamming.[8]

Because of the serious harm to consumers and the rural LEC members of NTCA caused by the Commission=s decision, NTCA respectfully requests that the Order be reconsidered and revised for the reasons set forth below.

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[7] A Petition for Reconsideration filed today by a coalition of Rural LECs documents their experiences.

[8] Letter from Senator John McCain to Chairman Kennard, October 30, l998. (AMcCain Letter≅)

II. VERIFICATION BY EXECUTING CARRIERS IS NOT PROHIBITED BY SECTION 222(b) OF THE COMMUNICATIONS ACT

1. Introduction

In its Order the Commission found that Section 222(b) of the Communications Act prohibits executing LECs from verifying carrier change requests. The FCC concluded that when a LEC receives a carrier change request from an IXC it A. . . may only use such information to provide service to the submitting carrier, *i.e.*, changing the subscriber=s carrier, and may not attempt to verify the subscriber=s decision to change carriers.≅[9] As shown below, this conclusion is in error because preferred carrier selection is a service provided to the end user, not the IXC and the information as to the end user=s preferred carrier is transmitted by the IXC as the agent for the end user and cannot, therefore, be proprietary as to the end user. The Commission=s conclusion is thus inconsistent with both the plain meaning and the obvious purpose of the statute and is inconsistent with the public interest because it harms customers and their LECs. The decision also impedes competition in the interexchange service market by disadvantaging ethical IXCs which do not slam customers.[10]

2. Carrier Change Requests Submitted by IXCs Are Not Proprietary with Respect to the Subscriber

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[9] Order at para. 99.

[10] NTCA has no quarrel with the Commission=s conclusion that Section 222(b) prohibits the use of information derived from carrier change requests to market services to the customer. Order at para. 106. No marketing is conducted during LEC verification, the only question put to the subscriber is whether or not the subscriber ordered the change.

Section 222(b) requires that:

A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts. [11]

[11] 47 U.S.C. 222(b).

The Commission=s conclusion that an executing carrier receiving a preferred carrier change request may not verify that request with the subscriber because the information is proprietary to the submitting IXC turns the concept of proprietary information on its head. Of course the information must be treated by the LEC as proprietary in so far as the LEC may not disclose the information to other IXCs or any other party to which it would be of competitive benefit.[12] However, because the information is also proprietary to the end user, nothing in Section 222(b) can be read to require executing carriers to keep the carrier change information secret from the end user.

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[12] 47 U.S.C. 222(a). Just as a motor carrier could not tell Macy=s about the new spring fashions it transported to Gimball=s, there is no dispute that a LEC cannot tell MCI which subscribers are presubscribed to AT&T or vice versa, even in the absence of Sections 222(a) and (b). *See,* Uniform Trade Secrets Act, Sec. 1(2), 14 U.L.A. 437-38.

The Commission=s conclusion that a submitting carrier=s request is propriety information Abecause it must submit that information to the executing carrier . . .≅ misses the point. It isn=t the process of submitting the information that makes information proprietary. The information is proprietary because it would be useful to a competitor. In any event, IXCs are not *required* to submit the information, they *choose* to act as agent for the end user, but the end user can submit the information. FNPRM at para. 4.

The FCC Order states Apursuant to section 222(b), the executing carrier may only use [the proprietary] information to provide service to the submitting carrier . . .≅[13] This statement presumes that the LEC is providing service to the submitting carrier. In fact, providing 1+ dialing is a service that a LEC performs for its *end user customer*, not the submitting IXC. This relationship is an inherent and necessary part of several Commission requirements, including the definition of supported universal service and the equal access requirements.[14] The National Exchange Carrier Association (NECA) Tariff FCC No. 5 establishes a $5.00 charge for presubscription.[15]

While the tariff also provides a charge to IXCs for unauthorized changes,[16] this establishes only that both the IXC and the end user have a carrier-customer relationship with the LEC. It does not elevate the IXC=s rights over those of the subscriber as to information which involves both of them. To the contrary, because the subject matter at issue is the *subscriber=s choice*, any preference must go to the rights of the subscriber. In an environment where slamming is commonplace, the Commission=s first duty is to consumers,[17] and if there is a second duty it is to promote *fair* competition by discouraging rather than encouraging theft of customers by fraud.

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[13] Order at para. 99.

[14] 47 C.F.R. 54.501(a)(7); Allocation Order, 202 FCC 2d at 911.

[15] NECA Tariff F.C.C. No. 5, 12 Revised Page 17-37

[16] *Id.* Note there can be no proprietary right to the information involved in an unauthorized change request.

[17] *See* n.9, *infra*.

The Commission=s reading of the obligations of carriers to protect proprietary information has the effect, under the established facts in this record, of compelling LECs to charge customers fees for which they are not liable for carrier changes they did not want. Under other circumstances, we would expect the Commission to find the imposition of so many incorrect preferred carrier change charges to be in violation of Sections 201(b) as well as Section 203(c) of the Act.[18]

[18] 47 U.S.C. 201(b), 203(c).

Information which purports to reflect an order submitted by an IXC acting as the agent of a subscriber is proprietary *as to the subscriber*. It is illogical to presume that Congress intended that a subscriber=s proprietary information cannot be divulged to him or her.[19] There is no basis in the law for the proposition that information held by an agent purporting to reflect the actions of a principal must kept from that principal in order to protect the commercial interests of the agent.

[19] The Commission=s use of the possessive in formulating its statement of the action required of the executing carrier, Achanging the subscriber=s carrier,≅ demonstrates that it is the subscriber whose proprietary interest is at least primary as to the IXC, therefore the IXC cannot be heard to complain when the information is provided to the subscriber.

The Commission=s Rules recognize that a submitting carrier is acting as the agent of the end user. [20]Consideration of basic principles of agency law is instructive in determining whether Congress intended to give IXCs any right to insist that subscribers cannot be advised of the existence of their own carrier change orders. When an end user decides to change his or her preferred interexchange carrier, he or she appoints the new IXC as their agent to submit the change request to the LEC. The LEC, relying on the IXC=s claim to be the agent of the end user, makes the necessary software changes to provide the requested service to the end user. If the IXC is not an authorized agent, the end user will have a claim against the LEC for any damages. When the LEC asserts the defense of apparent authority of the IXC, it will have to demonstrate that the end user has taken, or failed to take, some action to create a reasonable belief that the IXC is the end user=s agent. Given the large percentage of change requests which are rejected, the reasonableness of the LECs belief in the apparent authority of the IXC will be difficult to establish. Thus LECs accepting unverified agency claims do so at their peril and the Commission has not said that its rules preempt state tort and agency law.[21]

This analysis demonstrates that as a matter of law, an agent has no right or reason to require that information regarding its principal be kept secret from the principal.[22] The Commission cannot lawfully presume that Congress intended to change this fundamental legal

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[20] 47 C.F.R. 1160.

[21] LECs may be able, in some cases, to limit their liability by tariff, but even where that is so, the fact remains that the Commission=s rules promotes unauthorized agency actions.

[22] Where the change is not, in fact, authorized, the IXC has reason to keep the change order secret from the end user, but it has no right to do so.

principle without at least a clear indication of such intent. This conclusion is more compelling where there is no competitive harm to the agent. Where the carrier change request is actually what the end user intended, i.e., the IXC was authorized to act as the end user=s agent, the change is executed promptly and the submitting carrier is not harmed.[23]

[23] Verification necessarily results in a short delay as compared to execution on receipt. This delay is entirely reasonable in light of the extensive record demonstrating the ubiquity of slamming by large and small IXCs alike. It is both just and reasonable that the IXC industry which causes the problem by dishonest unethical practices should accept the burden of this short delay as compared to the rural LEC industry which is innocent of wrongdoing.

The experience of LECs that, until release of the Order, made a practice of verifying changes has been that *at least 40-50% of change orders received were invalid.*[24] Given the very high probability that any given carrier change order is invalid, it is entirely reasonable and legal for the executing carrier to verify the change before executing it. Failure to verify the authority of the IXC to act as the end user=s agent under these circumstances subjects the LEC to potential liability. The Commission=s new rules will eventually provide the end user with thirty days free service, but that may be a nominal amount that does not begin to compensate the end user for the time and aggravation of getting returned to his or her preferred carrier.[25]

C. Verification of Carrier Change Requests is Consistent with the Intended Purpose of the Information.

Section 222(b) requires that proprietary information received from another carrier for the purpose of providing a telecommunications service, may only be used for such purpose, which the Order interprets as meaning that the LEC must automatically change the end user=s primary carrier and may not contact the customer to verify his or her choice .[26] The LEC verification

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[24] *See,* Petition for Reconsideration of the Final LECs and e*x parte* presentation cited at n.32, *infra.*

[25] As discussed at Section V, below, the end user may well not be aware of being slammed until after the 30 day free period is over and may have little usage during that period.

[26] 47 U.S.C. 222(b), Order at para. 99. If the statute prohibits any action by the carrier except executing the order, then it should follow that the statute requires the order be executed whether or not the customer has previously requested a Apreferred carrier freeze,≅ yet the Commission endorses freezes. The Commission also encourages LECs to notify customers once changes have been made, which is also inconsistent with its theory of the meaning of Section 222(b). *See,* Truth-in-Billing and Billing Format Notice of Proposed Rulemaking, CC Docket No. 98-170, 13 FCC Rcd 18176, 18184, para. 19 (1998).

process is an integral aspect of executing changes in a customer=s preferred carrier. Where a very large portion of the requests have been found to be attempts at slamming, which would have been successful slams but for the verification by the LEC, the statute cannot have contemplated that slamming be a protected purpose. Yet that is the necessary implication of the Commission=s interpretation of the law.

4. The Purpose of Section 222(b) is to Prevent Competitive Misuse of Proprietary Data

Congress intended by the express terms of Section 222(b) to prevent carriers from using information obtained from another to be used for the carrier=s Aown marketing efforts≅ against the submitting carrier. There is, however, no indication that Congress intended to elevate the interests of carriers over those of consumers.[27] As stated above, NTCA has no quarrel with a conclusion that the statute proscribes the competitive marketing of the LEC=s or any other carrier=s service against the interests of the submitting carrier. The unstated assumption of the Order apparently is that somehow any contact with the consumer constitutes some sort of subliminal message that the subscriber has made a bad choice and should reconsider. There is no basis for such an assumption, the fact is that the verification process of the Rural LECs does not constitute Amarketing,≅ as used in the statute or otherwise.

There is no basis in the record or in fact for such assumption, and the Commission=s duty to consumers requires that it encourage rather than discourage practices which have prevented thousands and thousands of unauthorized changes. The LECs employing verification are very

[27] *See*, McCain Letter.

much aware that every time their verification stops an IXC from slamming a customer, the IXC will look for a way to retaliate and will threaten litigation. They have therefore been scrupulous to avoid any marketing or other statements which could be construed in anyway as attempts to influence the subscribers choice of IXC. There was no evidence to the contrary before the Commission, but there was massive evidence of fraudulent unauthorized changes being submitted. The Commission is obligated to show a rational connection between the facts on its record and its policy chosen. Prohibiting a practice which protects consumers from a serious evil without a material competitive effect on IXCs is inconsistent with that obligation.

The Commission apparently concluded that because some of the LECs have affiliated IXC operations of their own, they have an incentive subtly, if not blatantly, to influence the subscriber=s choice. [28] The IXCs commented that LECs *could* use verification to their advantage, the Order states that there *could* be anticompetitive effects, but nowhere does the Order try to balance these *suppositions* unsupported by any record of actual harm with the staggering volume of slamming complaints to the Commission and the states.[29] A simple prohibition on the use of information for marketing purposes ensure compliance with Section 222(b) while protecting consumers from slamming.

The Commission was given a choice between a potential harm based on assumptions regarding incentives and a proven extraordinary record of real substantial harm, but chose

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[28] Order at para. 99 and n.315.

[29] Order at para. 2 (Aslamming has increased at an alarming rate.≅).

assumption over reality. In any event, the speculative assumptions that LECs will act illegally anytime they have an incentive to do so has no application whatsoever to the large percentage of rural LECs[30] which have no IXC operation and so have not even a theoretical incentive to disadvantage the submitting carrier. Yet the Commission=s decision will punish the subscribers of these LECs and the LECs themselves on the sole basis of speculation that other LECs might illegally act on a perceived incentive.

[30] Less than 40% of NTCA members have IXC affiliates.

III. VERIFICATION BY EXECUTING CARRIERS SERVES THE FCC'S OBJECTIVE OF ELIMINATING SLAMMING AND IS THEREFORE IN THE PUBLIC INTEREST

A. Executing Carrier Verification Uncovers and Curbs Slamming

The record of executing carriers uncovering unauthorized carrier change requests is impressive. Executing local exchange carriers have reported that 40-50% of the subscribers contacted for the purpose of verifying a request to change their presubscribed interexchange carrier (PIC) said they (the subscribers) did not authorize such change.[31] This astronomical percentage of unauthorized carrier change requests is evidence that unauthorized changes are not being corrected by the submitting carrier, and therefore executing carrier verification is not duplicative. Even assuming the new, tougher FCC anti-slamming rules have some success in reducing slamming, unscrupulous carriers still have a financial incentive to engage in slamming. If the new rules actually do eliminate slamming, then the Rural LECs will no reason to continue verification because there will be no need to protect their subscribers. Based on executing carriers' remarkable record of uncovering unauthorized change requests, with executing carrier

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[31] *Ex parte* Presentations by David Cosson, Kraskin, Lesse & Cosson, LLP on behalf of independent telephone companies, Nov. 12, 1998 and Dec. 4, 1998.

A coalition of small, rural LECS is also this day filing a Petition for Reconsideration of the Second R&O requesting reconsideration and reversal of the prohibition on executing carrier verification. That petition will present direct evidence that executing carrier verification uncovers a significant percentage of unauthorized carrier change requests.

verification, it is reasonable to expect that executing carrier verification will continue to expose and deter slamming.

In the Second R&O, the Commission acknowledged that "verification by executing carriers of carrier changes could help to deter slamming."[32] But when slamming goes unchecked, all parties, the customer, the executing carrier, and the preferred carrier lose. When slamming occurs, customers and carriers lose time and money, losses that are calculable. But the executing carrier also loses goodwill, which is incalculable, and may never be regained. Executing carrier verification avoids unauthorized carrier changes *and* avoids the cost and time associated with resolution of customer complaints and loss of consumer confidence in the executing carrier.

B. The Benefit of Allowing Executing Carriers to Verify Carrier Change Requests Far Outweighs the Risk that They Will Engage in Anti-competitive Behavior

Although the Commission "agree[d] that verification by executing carriers of carrier changes could help to deter slamming," it was concerned that executing carrier verification "could have anticompetitive effects."[33] Specifically, the Commission was concerned that executing carriers would have an incentive to delay or deny carrier changes in order to benefit themselves or their affiliates.[34] Weighing this speculative concern against the deterrence to slamming, the

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[32] Second R&O at p. 61, para. 99.

[33] *Id.*

[34] *Id.*

Commission forbade executing carriers from verifying carrier changes.

First, the Commission's premise - that executing carrier verification spawns anticompetitive behavior - is not supported by the evidence, which consists largely of charges by interexchange carriers (IXCs). In a highly competitive environment, IXCs are certain to oppose any measure which could, *conceivably*, slow down the process of signing up new customers. Accordingly, MCI, AT&T and others have opposed executing carrier verification on this basis. Yet, absent evidence that executing carriers have, in fact, abused the verification process, the Commission has no basis for prohibiting executing carrier verification as a means of alleviating slamming.

Second, the Commission's decision to prohibit executing carrier verification does not reflect a balancing of the pros and cons of executing carrier verification. The goal of the FCC rulemaking and Section 258 of the Telecommunications Act of 1996 (1996 Act) is to eliminate slamming. In the Order the Commission purports to weigh the benefits of executing carrier verification in achieving this goal against the potential for anticompetitive abuse by executing carriers. On the basis of executing carriers' success in weeding out unauthorized carrier change requests, it is clear, *and the FCC acknowledges* that executing carrier verification does deter slamming.

The Commission reported that it processed 20,500 slamming complaints in 1997 alone.[35] Since 1994, the FCC imposed monetary penalties of approximately $16 million on only 22

[35] Second R&O at p. 4, para. 2.

carriers.[36] This reflects the enormity of the problem. Balancing the certainty that executing verification does deter slamming, against the possibility that a minimal number of carriers might use verification to gain a competitive advantage, the weight of the evidence favors executing carrier verification.

[36] Second R&O at p. 4, para. 3.

Third, the Commission can allay any concerns it has about anticompetitive behavior by executing carriers by imposing limited regulatory safeguards against anticompetitive behavior. For example, the Commission could require that verification must occur within a certain period of time after a request is submitted, and once verification takes place, execution of an authorized carrier change occur within a certain period of time. [37] In order to satisfy concerns about carrier change delay or anticompetitive behavior by the executing carrier, the Commission could prescribe a shorter period of time, perhaps five calendar days, or three business days for executing carrier verification. As an additional safeguard against anti-competitive behavior, the Commission could specifically prohibit executing carriers from marketing their company's (including affiliates') services in connection with verification of a carrier change request.[38]

The Commission need not prevent executing carriers from verifying carrier change requests, thereby *protecting their subscribers from unauthorized carrier changes,* in order to prevent anticompetitive practices by the executing carriers. The FCC's anti-slamming rules can meet the overall pro-competitive objective of the 1996 Act by less drastic means than prohibiting executing carrier verification.

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[37] The Commission previously authorized a 14-day time-period for customer verification of a carrier change under the "welcome package" rule. 47 C.F.R. 64.1100(d)(8).

[38] Proposed rules were submitted to the Commission. *See, ex parte* presentation to James Casserly on December 4, 1998.

IV. VERIFICATION OF PREFERRED CARRIER CHANGES IS PROTECTED BY THE FIRST AMENDMENT FROM UNWARRANTED GOVERNMENTAL INTRUSION

In response to issues raised by GTE and USWest, the Commission concluded that prohibiting carriers from using other carrier=s proprietary information for marketing purposes does not impermissibly infringe upon the First Amendment rights of the executing carrier.[39] The Commission did not address the Constitutional issues with regard to verification by executing LECs however, and the substantial differences between the two situations leads to opposite results.

In regard to the three *Central Hudson*[40] criteria cited in the order, NTCA agrees that there is a substantial government interest in advancing competition and protecting consumer choice. The rule prohibiting verification and the Commission=s interpretation of Section 222(b) do not directly advance the asserted government interest. To the contrary, by failing to prohibit executing LECs from verifying preferred carrier changes, the Commission directly *harms* competition and carrier choice. The so-called competition between IXCs as it has unfolded in rural America is not competition at all, but rather a glorified cheating contest.[41] Slamming

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[39] Order at para. 107

[40] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980) (Central Hudson).

[41] Ethical IXCs benefit from the verification process and are harmed by the

fraudulently deprives consumers of the choices they have made; verification preserves consumer choice by preventing slamming. Nothing else has effectively done so.

Prohibiting a LEC from telling its subscriber that a change in that subscriber=s preferred carrier has been submitted by an IXC purporting to be the subscriber=s agent, and that a charge will be made to the subscriber for executing the change is not the least restrictive rule which could have been adopted. The prohibition therefore is an unconstitutional infringement on the rights of LECs to speak to their subscribers. The Commission chose to allow IXCs to continue to submit changes without the consumers knowledge, despite evidence of massive fraud which has been largely unpunished, yet it adopts a prohibition when there is no evidence of harm and other remedies are readily available.

V. THE CONSUMER LIABILITY RULES REQUIRE REVISION

1. Subscribers Should Not be Liable for Charges to an Unauthorized Carrier for the First 30 days After Receiving Notice of an Unauthorized Change.

Commission=s prohibition, because their customers are not fraudulently changed to other carriers.

The Order correctly concludes that consumers should be absolved of liability for charges by an unauthorized carrier for a limited time in order to compensate consumers Afor the time, effort and frustration they experience as a result of being slammed,≅ as well as provide a disincentive to slamming.[42] In order to balance these objectives with a concern that consumers will try to obtain free service without justification, the rule adopted limits the absolution period to the period of thirty days after the unauthorized change occurs.[43] The thirty day period was chosen on the assumption that the consumer will discover the change upon receipt of his or her first monthly bill.[44]

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[42] Order at paras. 20, 21.

[43] *Id.* at para. 23, 47 C.F.R. 64.1100(d).

[44] Order at para. 23.

NTCA does not question the need for some limit on the absolution period, but is concerned that setting the beginning of the thirty day period at the time of slamming does not provide an adequate period to either compensate consumers or deter slammers. Given this rule, the slamming carrier will simply delay billing of all or a majority of the calls, depending on their dollar value, until the thirty days have past. Even where the delay is not intentional, there will be many cases where the calls are not billed, or the consumer does not, and could not with reasonable diligence, become aware of the slam within 30 days. A better rule, therefore would be for the period of absolution to run from the unauthorized change until 30 days after the consumer is notified of the change, through billing or otherwise. The waiver process proposed in the Order to deal with these situations is not practical for either the average consumer or the Commission. [45] The Commission cannot deal with a large volume of waivers, and consumers cannot be expected to prosecute such waivers where the dollar amounts are not major and the carriers file oppositions.

2. The Responsibilities of Billing Carriers Should be Clarified.

[45] Order at para. 24.

The rules adopted by the Order require that any carrier, including the subscriber=s LEC, notify the subscriber of the absolution of liability for charges during the first 30 days after an unauthorized change.[46] Because in some instances the LEC is also the billing agent for one or both of the IXCs, NTCA expects that questions will arise as to whether the LEC also has any obligations to itself make changes in the subscriber=s bill. Because billing and collection is conducted by agency contracts which specify how adjustments are to be made, NTCA believes that the executing carrier should have no obligations beyond the subscriber notification provision of Section 1100(d). We request that the Commission verify this conclusion.

VI. THE FCC=S SLAMMING RULES DO NOT COMPLY WITH THE REGULATORY FLEXIBILITY ACT

[46] Order at para. 18, 47 C.F.R. 64.1100(d).

The FCC issued a rule which forbids executing carriers from verifying carrier changes. This rule was adopted in violation of the Regulatory Flexibility Analysis requirements. The Regulatory Flexibility Act (RFA) of 1980[47] requires the Commission to solicit and consider flexible regulatory proposals to minimize the significant impact of the rules on small entities without conflicting the objectives of proposed regulations. The 1995 Small Business Enforcement Fairness Act of 1996 strengthened the position of small businesses by requiring a more detailed and substantive regulatory flexibility analysis. The Commission is continually deficient in its recognition and analysis of small ILECs. The Commission=s assertion that small ILECs cannot qualify as small businesses is incorrect. The Commission justifies its conclusion that an ILEC cannot be a small entity because it is dominant in its field of operation. However, as was pointed out by the U. S. Small Business Administration (SBA),[48] the agency charged with determining which entities are covered by the RFA, a lack of dominance in its field of operation is but one of the Small Business Act=s criteria for defining a Asmall business ≅[49] and dominance is determined on a *national* basis.[50] Small ILECs are certainly not dominant on a national level and therefore qualify as small businesses under the Small Business Act and RFA. Small ILECs should

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47 5 U.S.C. ∋ 601.

48 *See,* Comments of the U.S. Small Business Administration, *Deployment of Wireline Service Offering Advanced Telecommunications Services*, CC Docket No. 98-147 (September 25, 1998).

49 15 U.S.C. ∋ 632.

50 13 C.F.R. ∋ 121.102(20).

be subject to a complete regulatory flexibility analysis by the FCC.[51]

Under Section 603(b) of the RFA, whenever an agency is required to publish a general notice of proposed rulemaking, the agency is required to prepare and make available to the public an initial regulatory flexibility analysis (AIFRA≅). The analysis must describe the impact of the proposed rule on all small entities. Congress listed specific subjects that must be addressed as part of the IRFA. One requirement is that the rulemaking proposal contain a description of any significant alternatives to the proposed rule which will accomplish the stated objectives and which minimize any significant economic impact of the proposed rule on small entities. In the instant situation, the Commission purports to request comments on alternative proposals in its NPRM, but the FCC failed in its duties.

[51] The FCC purports to perform a regulatory flexibility analysis on small ILECs Aout of an abundance of caution.≅ However, the analysis is cursory and does not meet the RFA requirements.

The FCC gave no warning in its NPRM[52] that it was considering a rule to eliminate verification by executing carriers. In its NPRM, the FCC said no more than it believed that ASection 258 does not require that an executing telecommunications carrier duplicate the PC-verification efforts of the submitting telecommunications carrier.≅[53] The language indicates that the FCC was considering not *requiring* executing carriers to verify changes. It does not indicate the FCC was considering *forbidding* the practice. The FCC specifically sought comment on additional or separate verification procedures for executing LECs, not doing away with the practice.[54] In fact, the NPRM arose out of a Congressional recognition that slamming Ais a significant consumer problem.≅[55] The logical progression of the FCC=s NPRM would be that any practice which prevents unauthorized carrier changes would be encouraged, not forbidden. As demonstrated clearly above, verification by local exchange carriers protects the consumer from being slammed and is consistent with Congress= stated objective. The rural telcos were never even made aware of what the FCC was considering and never had the opportunity to comment on it. The FCC implemented its rule without a full record of its impact.

Also, the Commission=s Final Regulatory Flexibility Analysis fails to describe any steps taken to minimize the economic impact on rural telephone companies or to explain why alternatives were rejected. The Analysis never mentions the LEC verification issue or the

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52 *Further Notice and Order*, 12 FCC Rcd 10674.

53 12 FCC Rcd 10683.

54 *Id*. at 10684.

55 *Id*. at 10678.

Commission=s conclusion as to the requirements of Section 222(b). Executing carrier verification is the issue of most concern to the small entities the RFA was intended to protect. The entire discussion of the verification issue centers around suggestions from the large ILECs.

The FCC eliminated a verification option for ILECs in violation of the RFA. Alternate proposals were not solicited. Alternative proposals were not considered. The Commission must reconsider the rules, based on a complete record.

VII. CONCLUSION

The dual purposes of the Telecommunications Act of 1996 are to promote competition and protect consumers. By construing the Act contrary to its letter and purpose, the Commission has adopted conclusions and rules which will harm both competition and consumers. Rural LEC=s customers were the one segment of the population which had some protection from the widespread and invidious practice of slamming. This protection arose because the rural LECs take their obligations to their customers seriously and because the LECs were themselves suffering serious damage to their business reputations. The Commission has now decided to take away the one tool that has been proven to be effective against slamming. For the reasons set forth above, this conclusion is based on misinterpretation of the law and a failure to put the interests of consumers ahead of the interexchange carriers who practice slamming. The Commission should reverse its conclusion regarding Section 222(b) of the Act and rescind Section 64.1100(a)(2) of its rules.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Petition for Reconsideration of the National Telephone Cooperative Association in CC Docket No. 94-129, FCC 98-334 was served on this 18th day of March 1999 by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

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